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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MICHAEL BURTON, as personal
representative of BETTY BUGHMAN
BURTON WILLIAMS, deceased,
Petitioner,

vs.

PACIFIC FAR EAST LINES, INC.,
a corporation,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Should this Court establish guidelines for the exercise of trial court discretion relative to dismissal for want of prosecution?

2. Should a Plaintiff suffer dismissal for his attorney's delay, where the appropriateness of lesser sanctions has not been explored and the risk of prejudice to the defendant has not been thoroughly considered?

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**PETITION FOR A WRIT OF CERTIORARI
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The petitioner Michael Burton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 25, 1983.

OPINION BELOW

The unpublished opinions of the Court of Appeals (703 F.2d 754, Table) and the District Court, Northern District of California, appear in the Appendix hereto.¹

¹*Matters of Form:* The Appendix to this Petition will be cited hereafter as "A", followed by page number. Excerpts of Record were filed with the Court of Appeals for the Ninth Circuit. Plaintiff-appellant's Excerpts will be cited as "ExP". Defendant-appellee's Excerpts will be cited as "ExD". They will be followed by Tab numbers.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered February 25, 1983. A timely petition for rehearing *en banc* was denied on May 9, 1983, and this petition is filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure, 28 U.S.C. Rule 41(b) :

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

Subject matter jurisdiction of the District Court: 28 U.S.C. § 761 (death on the high seas).

On or about March 15, 1977, plaintiff's mother, Betty Bughman Burton Williams was lost overboard on the high seas while a paying passenger on the *SS Monterey*, a vessel owned by defendant.

On March 28, 1977, plaintiff filed an action against defendant in United States District Court, Northern District of California (No. C 77 0636 SW). The action sought damages for wrongful death. Defendant moved to dismiss

for failure to allege federal jurisdiction. Plaintiff voluntarily dismissed the action May 4, 1978.

On April 19, 1977, plaintiff filed a second wrongful death action in Superior Court, State of California, County of San Francisco (No. 721 774).

Discovery had begun while the District Court action was pending. It continued in the Superior Court action throughout 1977. The parties answered each other's interrogatories and requests. They took nine depositions. They stipulated to the use of completed discovery, no matter which court eventually tried the case. ExP 16.

The Superior Court dismissed plaintiff's action on December 16, 1977. It had sustained defendant's third demurrer on jurisdictional grounds, without leave to amend. A 2. Plaintiff noticed an appeal from the Superior Court's judgment, but abandoned it on December 29, 1977. ExD 24.

On January 30, 1978, plaintiff filed a new action in District Court (No. C 78 0220 SW). It is with this action that this Petition is concerned. Plaintiff notified defendant, as did the Court, of the pendency of the case within a month after its institution. ExD 2, 22.

On January 31, 1978, the day after plaintiff commenced this action, defendant filed a Chapter XI bankruptcy proceeding. This automatically stayed all proceedings against defendant. Due largely to plaintiff's efforts, the bankruptcy stay was lifted 30 months later, on August 5, 1980. A 8.

On March 13, 1981, plaintiff served his First Amended Complaint in the pending action upon defendant. ExP 7. Plaintiff's counsel had inadvertently failed to serve defend-

ant for the seven months following removal of the bankruptcy stay.

Defendant appeared on March 20, 1981, filing an answer and motion to dismiss. The motion was heard April 22, 1981. On October 22, 1981, the motion was granted and the case dismissed. A 5. A timely motion for reconsideration was denied December 10, 1981. A 7.

The Court of Appeals affirmed the District Court judgment on the sole ground of failure to prosecute. A 1-3.

REASONS FOR GRANTING THE WRIT

The decision below sanctions a departure from the accepted course of judicial proceedings and gives rise to a conflict in approach with another court of appeals concerning dismissal for want of prosecution

The case at bar was dismissed with prejudice for want of prosecution,² under Rule 41(b), Federal Rules of Civil Procedure.

In *Link v. Wabash Railroad Co.* 370 U.S. 626 (1962), this Court confirmed the undisputed power of a federal court to dismiss a plaintiff's action with prejudice because of his failure to prosecute. Dismissal is within the court's discretion, "when circumstances make such action appropriate." *Id.* at 633.

Link, however, sets forth no standards for the exercise of district court discretion, nor does it elaborate the circumstances under which dismissal is appropriate.

²The District Court opinion alludes to "vexatious litigation." A 5,9. The Court of Appeals, however, treated the dismissal as resting *solely* upon lack of prosecution. A 1-3.

In this regard, the Fifth Circuit has been particularly active in establishing guidelines for trial courts, and in enforcing adherence to them:

Rogers v. Kroger Co. 669 F.2d 317 (5th Cir. 1982) holds squarely that consideration of lesser sanctions *must* accompany a clear record of delay, or dismissal will be reversed. *Id.* at 322, 323. The *Rogers* Court surveyed an array of less drastic sanctions available to safeguard the court's right to control its docket. Included were assessments of fines and costs, attorney disciplinary measures, conditional dismissal orders and explicit warnings. *Id.* at 321, 322.

In most of the dismissals affirmed by the Fifth Circuit, at least one of three "aggravating factors" has been present: Prejudice to defendant; intentional delaying conduct; or plaintiff's own culpability, rather than his attorney's. *Rogers, supra*, at 322. The court is mindful that a client is accountable for his attorney's wrongs (*Link, supra*, at 633-634), but is less willing to permit dismissal where the plaintiff himself is innocent. *Rogers, supra*, at 322.

The factors of which the Fifth Circuit requires examination must be considered even where the delay is occasioned by failure to serve summons and complaint. *Veazey v. Young's Yacht Sale & Service, Inc.* 644 F.2d 475 (5th Cir. 1981).

In the Ninth Circuit, it is accepted practice to consider less drastic remedies before dismissing a plaintiff's case for delay. *Anderson v. Air West, Inc.* 542 F.2d 522, 525 (9th Cir. 1976). Likewise, while a showing of actual prejudice is not prerequisite to such dismissal [*Pearson v. Dennison* 353 F.2d 24, 28 (9th Cir. 1968)], its absence is

usually considered in determining the soundness of a trial court's discretion. *Anderson, supra*, at 524. Whether the delay was caused by plaintiff himself or by his attorney is also a factor to be weighed. *Anderson, supra*, at 626.

The decision below relies primarily upon *Citizens Utilities Co. v. American Tel. & Tel. Co.* 595 F.2d 1171 (9th Cir. 1979). A 3. The Court there affirmed dismissal of an anti-trust action which had been pending 16 years. *Id.* at 1172.

Citizens is silent on the issues of alternative sanctions and counsel's culpability. It discusses, however, balancing the need to expedite litigation and avoid prejudice, with the policy favoring trial on the merits. *Id.* at 1174.

The balance between the interests of speedy resolution and trial on the merits is clearly not an easy one to strike. In *Link v. Wabash Railroad Co., supra*, Justices Harlan and Black eloquently discussed the merits of those interests. Justice Harlan, writing for a four-to-three majority, favored granting greater discretion to trial courts "to achieve the orderly and expeditious disposition of cases." *Id.*, 370 U.S. at 630-631. Justice Black placed greater emphasis upon disposition on the merits, cautioning that the Court not "attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable. . . ." *Id.* at 648 (Black, J., dissenting).

The decision below, like *Citizens, supra*, discusses this balance of interests. A 3. It makes no mention of possible alternative sanctions. Neither does it allude to the culpability of plaintiff or his attorney. A 1-3.

While the Ninth Circuit opinion states that the District Court considered the risk of prejudice to defendant, it fails

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 81-4669

D.C. No. 78-0220-SAW

Michael Burton,
Plaintiff-Appellant,

vs.

Pacific Far East Lines, Inc., a corporation,
Defendant-Appellee.

Appeal from the District Court
for the Northern District of California

Spencer Williams, District Judge, Presiding

Submitted: February 14, 1983*

MEMORANDUM

[Filed Feb. 25, 1983]

Before: Barnes, Wright and Poole, Circuit Judges.

Burton appeals an order and judgment dismissing his wrongful death action for failure to prosecute (Fed. R. Civ. P. 41(b)). We affirm.

Burton's mother, while a passenger on a ship of Pacific Far East Lines (PFEL), fell overboard in March 1977. About March 31, 1977, he sued PFEL for her wrongful death under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* (1970). Because the complaint did not allege

*Oral argument was waived by agreement of the panel. The court considered and rejected counsel's request for oral argument.

federal jurisdiction, PFEL moved to dismiss. Shortly thereafter, on May 4, 1977, Burton voluntarily dismissed the federal case and brought a new one in state court. Apparently he recognized the limitation on damages that would apply in federal court and believed a larger recovery could be had in a state action. PFEL demurred to the new pleading and, after the third demurrer was sustained, the state court dismissed without leave to amend for lack of jurisdiction and on December 16, 1977, entered a judgment of dismissal. Burton filed a notice of appeal but voluntarily abandoned it three weeks later.

On January 30, 1978, Burton filed a new federal action in district court. The allegations this time were purportedly based on the "General Maritime Law." Neither summons nor complaint was served on PFEL. Burton later filed a "notice of related case" which identified the earlier district court action but did not mention the related state court proceedings.

On January 31, 1978, PFEL entered into Chapter XI bankruptcy proceedings and an automatic stay of all actions followed. Burton applied to the bankruptcy court for relief from the stay in order to prosecute his lawsuit and he was so released on August 5, 1980.

From that day until February 11, 1981, Burton took no action. On the latter date the district court ordered a conference on the status of Burton's 1977 federal action in the mistaken belief that it was still pending. At that conference PFEL's counsel first learned that a new district court case had been filed. Without waiting for service, PFEL moved to strike or dismiss the second complaint. Burton promptly filed an amended complaint on March 13,

1981. One week later PFEL responded, attaching a proposed answer to be filed should its motion to dismiss be denied.

Seven months later, on October 15, 1981, the district judge granted PFEL's motion and dismissed under Rule 41(b) on the ground that Burton had failed to prosecute the case with reasonable diligence. Burton's motion for reconsideration was denied and he appealed.

A plaintiff in a federal action must prosecute his case with reasonable diligence. *Anderson v. Air West, Inc.*, 542 F.2d 522 (9th Cir. 1976). A district court may grant an involuntary dismissal of the action for failure to prosecute (Fed. R. Civ. P. 41(b)), and that dismissal will not be disturbed unless the court has abused its discretion. *Schmidt v. Herrmann*, 614 F.2d 1221 (9th Cir. 1980).

Here the facts clearly indicated long and unexplained delay in moving ahead a third lawsuit, even after the bankruptcy stay had ended. The court carefully considered the conflicting factors including the need for management of court dockets, the public interest in expeditious resolution of litigation, and the risk of prejudice to the opposing party. *Citizens Utilities Co. v. American Tel. and Tel.*, 595 F.2d 1171 (9th Cir. 1979). It balanced these considerations against the strong policy favoring disposition of cases on the merits. It concluded that this plaintiff had so far failed to exercise the requisite diligence that the case should be dismissed. We find no abuse of discretion in that ruling.

AFFIRMED.

United States Court of Appeals
for the Ninth Circuit

No. 81-4669

Michael Burton,
Plaintiff-Appellant,

vs.

Pacific Far East Lines, Inc., a corporation,
Defendant-Appellee.

ORDER

[Filed May 9, 1983]

Before: Barnes, Wright, and Poole, Circuit Judges.

The panel as constituted in the above entitled case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

United States District Court
for the Northern District of California

No. 78-0220 SW

Michael Burton, as personal
representative of Betty Bughman
Burton Williams, deceased,
Plaintiffs,

vs.

Pacific Far East Lines, Inc., a corporation,
Defendant.

ORDER OF DISMISSAL

[Filed Oct. 22, 1981]

This case came under submission on defendant's motion to strike or, in the alternative, to dismiss. After careful consideration of the pleadings, briefs, and other evidence, the court grants defendant's motion to dismiss. The following is a brief statement of the court's reasons.

Plaintiff's claims for relief arise out of a death at sea. While a passenger aboard defendant's ship, the S.S. Monterey, plaintiff's decedent was allegedly killed.

Since decedent's death in 1977, plaintiff has involved defendant in three separate actions, each concerning the death of decedent. Plaintiff has engaged in a litigious course of conduct consisting primarily of filing and dismissing claims.

In the present action, plaintiff initially filed suit in January 1978. Plaintiff was prevented from serving defendant until August 5, 1980 due to a stay order of the Pacific Far East Lines, Inc. bankruptcy proceeding. Once the stay

order was lifted, plaintiff delayed seven months before finally serving defendant.

Local Rule 235-11 and Rule 41(b) of the Federal Rules of Civil Procedure provide for dismissal for failure to prosecute diligently. Local Rule 235-11 permits dismissal when a plaintiff fails to serve a defendant within 40 days of filing the claim. In addition, Local Rule 235-11 provides for dismissal when a plaintiff has failed to take any action for longer than four months.

Reasonable diligence is required if a plaintiff is to avoid dismissal for want of prosecution. *Anderson v. Air West, Inc.*, 542 F.2d 522 (9th Cir. 1976).

In *Citizens Utilities Co. v. American Tel. & Tel.*, 595 F.2d 1171 (9th Cir. 1979), the court noted that a decision on a motion to dismiss for lack of prosecution requires weighing conflicting policies: on the one hand, the court's need to manage its docket, the public interest in expeditious resolution of litigation, and the risk of prejudice to the defendant from delay; on the other hand, the policy favoring disposition of cases on their merits. Recognizing these conflicting policies, this court finds that plaintiff has failed to exercise reasonable diligence in prosecuting this case.

IT IS SO ORDERED.

Date: 15 Oct. 1981

/s/ SPENCER WILLIAMS
United States District Judge

In the United States District Court
for the Northern District of California

No. C 78-0220 SW

Michael Burton, as personal representative of
Betty Bughman Burton Williams, deceased,
Plaintiffs,

vs.

Pacific Far East Lines, Inc., a corporation,
Defendant.

Order Denying Plaintiff's Motion of Reconsideration

[Filed Dec. 10, 1981]

This motion came before the court on plaintiff's motion to reconsider this court's earlier order dismissing the action. After carefully reviewing the pleadings, briefs, and other evidence, the court denies plaintiff's motion to reconsider. The following provides a brief explanation of the court's order.

This action arises out of a death at sea while plaintiff's decedent was a passenger aboard defendant's vessel, the SS Monterey. Initially, plaintiff filed an action in federal court in March 1977. Defendant brought a motion to dismiss that action, and plaintiff filed a voluntary notice of dismissal.

In April 1977, plaintiff filed a complaint in California Superior Court. Plaintiff alleges that this complaint was filed due to the more liberal remedy available under state law as compared to that remedy available in federal court. On three separate occasions between June and September 1977, defendant demurred to plaintiff's complaint. Each

time, the demurrer was sustained with leave to amend. In November 1977, defendant demurred a fourth time, and the court sustained the demurrer without leave to amend. A judgment of dismissal was entered. Plaintiff filed a Notice of Appeal of the Superior Court judgment in December 1977, yet, failed to perfect the appeal.

In January 1978, plaintiff filed the present action, 78-0220 SW. Subsequent to the commencement of this action but before service of process was effected, defendant, PFEL, filed a Chapter XI proceeding in bankruptcy. This resulted in an automatic stay of prosecution of actions. The stay order was lifted in August 1980 due largely to plaintiff's efforts. Nonetheless, plaintiff delayed eight months, until March 1981, before serving defendant.

Plaintiff argues that dismissal is improper since defendant has not suffered any prejudice from delay. Defendant, however, alleges substantial prejudice arising from the fact that the vessel in question, the SS Monterey, was auctioned as a result of the bankruptcy proceeding. Defendant further alleges that the crew members of the SS Monterey were released and the difficulty in locating these people would be substantial.

Plaintiff also argues that the eight month delay in serving defendant is not prejudicial when compared to the two and one half year delay resulting from the bankruptcy stay. The outcome of a motion to dismiss for failure to prosecute does not rest solely on a balance of a plaintiff's delays as compared to a defendant's delays. The court must consider several conflicting policies. The court's need to manage its docket, the public interest in expeditious resolution of litigation, and the risk of preju-

dice to the defendant from delay must be weighed against a policy favoring disposition of cases on their merits. *Citizens Utilities Co. v. American Tel. and Tel.*, 595 F.2d 1171 (9th Cir. 1979). Any delay caused by the defendant may serve as a mitigating factor to lessen the risk of prejudice to the defendant.

The history of this litigation is long and convoluted. Actions have been initiated and later abandoned or dismissed without ever reaching a judgment on the merits. Plaintiff contends that but for *Mobile Oil v. Higginbotham*, 436 U.S. 618 (June 5, 1978) he would have pursued his appeal in state court instead of filing the present action. Yet, plaintiff filed his Notice of Appeal in December 1977, and filed this action in January 1978 although *Higginbotham* was not decided until June 1978.

Viewed in its totality, plaintiff's conduct throughout this litigation has been less than diligent. The court is sensitive to the extreme hardship a dismissal will cause the client, nonetheless, in this instance, the need to terminate vexatious litigation requires a dismissal of this case for failure to diligently prosecute.

IT IS SO ORDERED.

Date: 10 Dec 1981

Spencer Williams
United States District Judge